



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 9, 1998

The Honorable Tod Mixson
Orange County Auditor
P.O. Box 399
Orange, Texas 77631-0399

Letter Opinion No. 98-103

Re: Whether county may settle lawsuit relating to
alleged wrongful acts of former sheriff and two deputies,
where county is not named as defendant (RQ-1045)

As County Auditor of Orange County, you ask whether the Orange County Commissioners Court may pay \$10,000 to settle a lawsuit against a former sheriff and two former deputies of Orange County.¹ As county auditor, you are required by section 113.064 of the Local Government Code to examine and approve "each claim, bill, and account" against the county before the meeting of the commissioners and a claim, bill, or account may not be allowed or paid until it has been so examined and approved.² The county auditor shall moreover "see to the strict enforcement of the law governing county finances."³ Accordingly, you inquire about this proposed expenditure.

The plaintiff brought this suit under 42 U.S.C. § 1983 for damages caused to herself and her children when her ex-husband, who was a deputy sheriff for Orange County, came into her house and shot and killed her boyfriend. The former sheriff and two other former deputies are defendants, but Orange County is not named as a defendant. Damages of \$75,000 each are sought against the defendants.

The Orange County Commissioners Court initially authorized the county attorney's office to provide a defense for the defendants in this action. However, the county attorney had to recuse himself from this suit, and the commissioners court engaged the services of two private attorneys to represent the defendants. Although the county attorney's recusal extended to his representation of the county, the commissioners court did not engage counsel to represent the county. Counsel for the defense has informed the commissioners court that the matter could be settled for \$10,000. The commissioners court, judging that this amount would probably be less than the ongoing cost of defense, authorized the attorney to proceed with the offer of settlement. The private attorney wrote to the county judge, indicating that the settlement had been arranged and asking for the county's

¹You sought advice from the county and district attorney pursuant to section 41.007 of the Government Code, but he declined to advise because of his recusal in the relevant litigation. Therefore, we have accepted this opinion request.

²Local Gov't Code § 113.064(a).

³*Id.* § 112.006(b).

check in the amount of \$10,000, payable to the plaintiff and her attorneys. The county judge has requested that you process the proposed settlement for payment.

You state that the commissioners court has not acted to approve the settlement that has been arranged, and you are concerned about substantiating the validity of the proposed payment. Since the county attorney could not advise you, you sought advice from a private attorney on whether you should issue the check for payment. He advised you that the settlement was in the county's economic interest, since the costs for two attorneys to defend a jury trial to verdict would far exceed \$10,000. However, he also noted that the case might never go to a jury. Characterizing the settlement as an indemnification of the defendants, he found no legal authority for the county to indemnify these officials under the facts of the case and recommended that you seek an attorney general opinion. Accordingly, you ask whether there is legal authority for the county to make this payment.⁴

The authority of a county commissioners court to employ counsel to represent county interests in suits, even when nominally against individuals, has been recognized in judicial decisions and the opinions of this office.⁵ The opinions of this office have stated this rule as follows:

Where a Texas governing body believes in good faith that the public interest is at stake, even though an officer is sued individually, it is permissible for the body to employ attorneys to defend the action. . . . The propriety of such a step is not made dependent upon the outcome of the litigation, but upon the bona fides of the governing body's motive.⁶

This common-law rule is partially codified in section 157.901 of the Local Government Code, which provides that a county official or employee sued by a third party for an action arising from that person's performance of public duty may be represented by the district attorney, the county attorney, or both. If additional counsel is necessary or proper, or if it reasonably appears that the act complained of may form the basis for filing a criminal charge against the official or employee, the

⁴You also ask whether the prospective payment to settle the lawsuit is a "claim, bill, or account," subject to the county auditor's approval under section 113.064 of the Local Government Code. We are unable to find any direct authority on this question. However, in view of the county auditor's role in the "delicate system of checks and balances [that] exists to protect" county funds, *Smith v. McCoy*, 533 S.W.2d 457, 459 (Tex. Civ. App.--Dallas 1976, writ dismissed), we will assume that the proposed payment is subject to the auditor's approval.

⁵Attorney General Opinion H-544 (1975) at 8; see *Guerra v. Weatherly*, 291 S.W.2d 493 (Tex. Civ. App.--Waco 1956, no writ); *City Nat'l Bank v. Presidio County*, 26 S.W. 775 (Tex. Civ. App. 1894, no writ); Attorney General Opinions JM-824 (1987) at 2, JM-755 (1987) at 1-2, MW-252 (1980) at 1, H-887 (1976) at 2, H-70 (1973) at 5; Letter Opinion No. 97-065 (1997); see also *City of Corsicana v. Babb*, 290 S.W. 736 (Tex. Comm'n App. 1927, judgment adopted); Attorney General Opinion M-726 (1970).

⁶Attorney General Opinions JM-824 (1987) at 2, JM-755 (1987) at 1-2, MW-252 (1980) at 1, H-887 (1976) at 2, H-70 (1973) at 5; Letter Opinion No. 97-065 (1997); see also Attorney General Opinion M-726 (1970).

official or employee is entitled to have the commissioners court of the county employ and pay private counsel.⁷

Thus, under the common-law rule or under section 157.901 of the Local Government Code the county may employ attorneys to defend county officers and employees where the commissioners court determines that the legitimate interest of the county, and not just the personal interest of the officer or employee, is at stake.⁸ This is a question of fact, to be resolved by the commissioners court in the exercise of good faith judgment. As this office stated in Attorney General Opinion JM-824, “[s]uch a decision does not have to conclude that the county officer must have been right, or that the suit ultimately must be defeated. The county need only determine that the public servant of the county acted in good faith within the scope of an official duty.”

The commissioners court, in deciding to employ private attorneys to represent the former sheriff and his deputies, presumably determined that the county’s interest was at stake in the litigation. If the commissioners court determines that it is in the county’s interest to settle the litigation for less than the ongoing cost of defending it, we believe it has authority to order the payment in question. The decision of the commissioners court to make the payment in settlement of this case is a discretionary matter for the court, subject to judicial review for abuse of discretion.⁹

We do not believe, despite the advice of the private attorney whom you retained, that the settlement would necessarily be indemnification of the officers. While the complaint in this civil action, which you have attached, is not a model of clarity, it appears that the defendants are being sued in either or both their official and individual capacities. Since any judgment against them in their official capacities would be paid by the county, such a payment would not indemnify the officers but discharge a county obligation.¹⁰ Accordingly, we conclude that the commissioners court has authority to settle the case by making the proposed payment.

⁷Local Gov’t Code § 157.901(b).

⁸Attorney General Opinion JM-824 (1987) at 2.

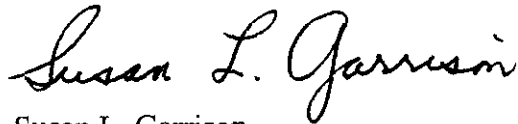
⁹See generally *Douthit v. Ector County*, 740 S.W.2d 16 (Tex. App.--El Paso 1987, writ denied); *Hooten v. Enriquez*, 863 S.W.2d 522 (Tex. App.--El Paso 1993, no writ).

¹⁰On the basis of this conclusion, we need not consider whether the settlement amount is the equivalent of attorney’s fees rather than damages.

S U M M A R Y

The Orange County Commissioners Court employed private attorneys to represent the former sheriff and his deputies in a lawsuit relating to their performance of official duties, presumably determining that the county's interest was at stake in the litigation. Under these circumstances, the commissioners court would also have authority to determine that it is in the county's interest to settle the litigation for less than the ongoing cost of defending it and to order the payment of such cost of settlement. The amount paid in settlement of the case is not indemnification of the officers, who have been sued in their official and individual capacities, since a judgment against them in their official capacities would be paid by the county as a county obligation.

Yours very truly,

A handwritten signature in black ink that reads "Susan L. Garrison". The signature is written in a cursive style with a large, flowing "S" and "G".

Susan L. Garrison
Assistant Attorney General
Opinion Committee